No. 91-1108

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
*Petitioners,*

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
*Respondents.*

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

---

## REPLY BRIEF

---

DAVID A. WEBSTER
*Counsel of Record for Respondents*

WILLIAM E. SUMNER
STEPHEN J. ANDERSON
SUMNER & HEWES
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

CLAY C. LONG
CARL W. MULLIS
BRUCE P. BROWN
LONG ALDRIDGE & NORMAN
1500 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 527-4189

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

**No. 91-1108**

---

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
*Petitioners,*

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
*Respondents.*

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

---

## RESPONDENTS' REPLY TO THE BRIEF OF THE UNITED STATES

---

The United States as Amicus Curiae correctly concludes that the petition for certiorari should be denied. The opinion of the Court of Appeals for the Eleventh Circuit does not conflict with decisions of either this Court or other courts of appeal, as the Solicitor General expressly agrees.

The decision below is consistent with *Associated Press v. United States,* 326 U.S. 1 (1945); and *Anderson v. United States,* 171 U.S. 604 (1898). Although a trade exchange necessary to economic success may

condition access upon payment for services rendered, neither *Associated Press* nor *Anderson* permits the exchange to require membership in an entirely different (nonexchange) organization as a condition of access. In this case, access to the multiple listing service is conditioned not solely upon joining Metro and paying Metro dues and fees, but also upon joining and paying dues to a separate organization altogether, a board of Realtors. Indeed, the Realtor requirement may be satisfied by joining a board other than Petitioner DeKalb Board, the corporate parent of Petitioner Metro.

Nor does the decision below conflict with *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989). Petitioners' attempts to redefine *Pope* notwithstanding, the *Pope* opinion confirms that the issue in that case was not Realtor membership as a condition of MLS access:

> The new [Realtor dues] schedule imposed a fee on each agency, plus an additional, slightly lower fee on each agent employed. As a result, the Popes were asked to pay nearly half of the total dues collected by the board. . . .
>
> * * *
>
> . . . Our inquiry is limited to determining whether the present fee schedule is reasonable.

*Id.* at 129, 130. The issue in *Pope* was thus apportionment of fees, not the exaction of Realtor dues. *Pope* poses no conflict with the instant case, as the Solicitor General agrees.

This Court should also deny certiorari in reliance upon its recent opinion in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, ___ U.S. ___, 60 U.S.L.W. 4465 [June 8, 192]. Petitioners contend that this Court should find their conduct "*per se* legal." Petitioners' Reply to the Brief of the United States, at 1-2. In effect, Petitioners argue that this Court may simply ignore the real-world economic effects of their dual membership requirement. Petitioners' argument amounts to the same sort of plea for "*per se* immunity" from the antitrust laws at the summary judgment stage which this Court rejected in *Kodak*. *Id.* at 4473 n.29.

*Kodak* rejected Petitioners' argument that any sort of plausible economic defense demands summary judgment:

> [I]n *Matsushita* [*Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 587 (1986) . . . t]he Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury.

60 U.S.L.W. at 4470 (emphasis in original). Plaintiffs showed, and the Eleventh Circuit concluded on these facts, that the dual membership requirement tends both to restrain competition in the market for professional association membership and to impose unnec-

essary costs for access to the market exchange. Summary judgment is unwarranted.[1]

Certiorari is also inappropriate for the other reasons shown in Respondents' initial brief, including the existence of factual issues yet to be resolved. For all of these reasons, Respondents once again urge denial of certiorari.

---

[1] The brief of the Solicitor General suggests disagreement with the Eleventh Circuit over the precise test to be applied to Petitioners' conduct. In particular, the Solicitor General appears to advocate application of the rule of reason not just to Plaintiffs' group boycott claims, as the court below ruled, but to both aspects of this case. Respondents dispute the appropriateness of applying the rule of reason to Plaintiffs' tying claims. Even the Solicitor General did not find this disagreement sufficient to warrant grant of certiorari, however.

Respectfully submitted,

DAVID A. WEBSTER

*Counsel of Record for Respondents*

WILLIAM E. SUMNER
STEPHEN J. ANDERSON
SUMNER & HEWES
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

CLAY C. LONG
BRUCE P. BROWN
CARL W. MULLIS
LONG ALDRIDGE & NORMAN
1500 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
(404) 527-4189